FOR ARGUMENT

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In The

Supreme Court of the United States

October Term, 1995

COLEMAN WAYNE GRAY,

Petitioner,

v.

J.D. NETHERLAND,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner submits this Reply to the Brief of Respondent to discuss Respondent's concessions by omission, errors of fact and law, and misleading or incomplete characterizations of the record.

I. MATTERS ABOUT WHICH THERE IS NO DISPUTE

The state may not employ deception to keep the opposing party from developing its case on an issue that the state has made determinative of the outcome. Respondent does not contest that this rule of due process applies in the criminal prosecution and capital sentencing context.[1]

The writ of habeas corpus "demands . . . application of basic constitutional doctrines of fairness." *Lonchar v. Thomas*, No. 95-5015, 1996 WL 142558, at *6 (U.S. 1996). To facilitate this application, the Habeas Corpus Rules "afford the district court substantial discretion in the conduct of a case once an answer has been ordered," including the discretion to order "[d]iscovery," and "a degree of discretion in determining whether to hold an evidentiary hearing." *Id.* at *9. The district court judge exercised his discretion in this

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[1] *Cf. Wood v. Bartholomew*, 116 S. Ct. 7, 10 (1995) (if "intentional misstatement" by prosecutor "we would not hesitate to condemn that misrepresentation in the strongest terms"); *United States v. Bagley*, 473 U.S. 667, 696 (1985) ("[t]he prosecutor . . . must place foremost in his [or her] hierarchy of interests the determination of truth.") (White, J., joined by then Chief Justice Burger, and then Justice (now Chief Justice) Rehnquist, concurring); *id.*, 473 U.S. at 704 n. 6 ("A deliberate effort of the prosecutor to undermine the search for truth clearly is in the category of offenses antithetical to our most basic vision of the role of the state in the criminal process."); *Giles v. Maryland*, 386 U.S. 66, 98 (1967) (the obligation of a prosecutor is "not to convict, but to see that, so far as possible, truth emerges."); *Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986) (undoubtedly improper conduct did not deny fair trial when no court had so found, evidence was overwhelming, and prosecutor had not "manipulate[d] . . . the evidence" or "implicate[d] other . . . rights of the accused").

case and ordered limited discovery[2] and an evidentiary hearing. Respondent does not suggest that these district court actions were an abuse of discretion.

The district court judge was concerned with how and why defense counsel were tricked regarding the issues to be tried at sentencing.[3] After a two day evidentiary hearing, the district court found as fact that when Commonwealth's Attorney Ferguson made an "unequivocal pledge" that only statements from Petitioner to inma[illegible] would be introduced, he had already, in fact, "arranged to present" other, *modus operandi*, evidence. J.A. 342. Ferguson "planned to violate his direct promise," he made a "decision to withhold this information and to surprise Mr. Gray's attorneys," and the "prosecutor's tactics prevented" preparation and investigation by defense counsel. J.A. 348, 350. These fact-findings are not seriously disputed by Respondent, as they are clearly supported by the record. *See* Fed. R. Civ. P. 52(a); *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985).[4]

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[2] *See* December 7, 1992, hearing, at 32-33 ("I . . . agonized over it. And I thought that I had fairly resolved the matter by granting what in my estimation was limited discovery. Because this is a case that at least created some nagging doubt in my mind, and I think it needed to be resolved. . . . [I]t was submitted to my sound discretion and I gave it the best reasoned analysis that I could.")

[3] The district court judge was concerned about the fairness of the Commonwealth telling defense counsel at the beginning of trial that at sentencing " 'we are going to put in some statements that came from Gray' " – "[t]hat's your notice, so to speak" – and "then you come on the day of the penalty phase and you find out . . . [that other issues will be litigated] and you have absolutely no notice or opportunity to deal with that. . . . " April 22, 1994, hearing at 429-30.

[4] Indeed, Respondent *agrees* that a party must have fair notice of the issues to be tried. At the outset of the evidentiary hearing conducted in the district court, counsel for Respondent – sounding like defense counsel during sentencing – sought and was granted extra time to prepare:

> [MR. McLEES] We have prepared a case. . . . And to be told on the morning of the hearing that the issue is something else than what we have understood . . . doesn't give us fair notice. I respectfully object.
>
> THE COURT: Now, Mr. McLees, I will certainly do this. If you feel like you don't have sufficient notice of what the hearing is really about and you need more time, I'll give it to you. It is that simple.

April 21, 1994, hearing at 6-7.

In addition to intentionally misdirecting defense counsel, the Commonwealth hid exculpatory evidence, and the district court found that the prosecutor's contention that there was no exculpatory evidence was "patently absurd." J.A. 345. For example, the district court found that the Commonwealth knew that Timothy Sorrell had motives to kill his wife, he had no alibi for the time of his wife's disappearance, he "changed his alibi throughout the murder investigation,"[5] he "was the primary and only suspect in the case for a substantial period of time," he made "suspicious comments [to police] after he was notified his wife and child had been found,"[6] he told persons that his wife and child were dead before they were found,[7] his wife had been "very angry and unhappy about [Timothy Sorrell's] apparent criminal activities," and officer

[5] Respondent contends that this district court judge fact-finding is erroneous, but there is record evidence to support it. *See* section II. B. 1., *infra*.

[6] For example, when Slezak spoke with Timothy Sorrell after the disappearance of the victims, "his first question was whether or not we had a helicopter up looking for the vehicle." J.A. 185-86.

[7] Slezak had in his files witness statements that, on the night of his wife and child's disappearance, *Timothy Sorrell "began to tell us about his wife being shot six times across the forehead, and his daughter being put in the trunk of the car as someone set the car on fire*." J.A. 237 (emphasis added). Respondent does not contest that this and other similar evidence was known by the Commonwealth when Slezak testified against Petitioner at sentencing. Respondent does disagree about the value of the evidence. *See* Section II. B. 2. b., *infra*.

Slezak went to the Commonwealth's Attorney to discuss seeking an indictment against Timothy Sorrell. J.A. 344-45.

In sum, then, the following is not disputed. The district court was entitled to hold an evidentiary hearing, and that court's fact-findings are, unless clearly erroneous, binding. The prosecution may not intentionally misadvise counsel about what will be a determinative capital sentencing issue, and the prosecution did. This misconduct "clearly and justifiably . . . shocked" defense counsel and "prevented" preparation. J.A. 350. These base due process violations left "no . . . reliability whatsoever" in the capital sentencing decision, and "the Commonwealth has not offered any justification for its unreliable procedure in this case." *Id.* at 351-52.

II. MATTERS ABOUT WHICH RESPONDENT HAS MISCHARACTERIZED THE RECORD AND THE APPLICABLE LAW

A. MISLEADING STATEMENTS AND SIGNIFICANT OMISSIONS REGARDING THE RELEVANT LAW

1. Petitioner's claim has always been that he was surprised by the Commonwealth's violation of its pledge

Respondent contends that Petitioner's constitutional challenge to the prosecution's conduct is a "moving target." *See, e.g.*, Respondent's brief at 23. Any fair reading of the record finds that Petitioner's fundamental complaint throughout this litigation – from the day of his sentencing trial until today – has been the same: the Commonwealth's affirmative misrepresentation regarding its presentation of the Sorrell murders, which was the cornerstone of the prosecution's argument that Gray posed a future danger, deprived Petitioner of a

fair sentencing proceeding.[8] Petitioner has steadfastly maintained that the prosecutor's conduct resulted in unfair surprise which deprived counsel of any meaningful opportunity to rebut the state's presentation on the determinative trial issue.[9]

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[8] The Respondent has earlier taken the position that these issues had been raised repeatedly. *See* Brief in Support of Motion to Dismiss State Habeas Petition at 20 ("[O]bjection was made [at trial] to the introduction of much of the evidence regarding the Sorrell murders based upon claimed short notice and *insufficient time to prepare*."(emphasis added)); December 7, 1992, hearing, at 14 (Respondent's counsel argues below that "[S]tate habeas counsel . . . raised all kinds of claims about the evidence that we used to prove future dangerousness. He raised all kinds of claims about 'Well, you are accusing him of these Sorrell murders. He has never been indicted for them, never been convicted of them, and that violates due process in all different sorts of ways' that he said in his direct appeal and in his state habeas proceeding."); April 21, 1994, hearing, at 4 (Respondent's counsel argues below that "The issues that Your Honor has identified here today, the question of notice given and the opportunity for cross-examination and whether there was exculpatory information that was not turned over, I think were addressed in previous pleadings, and for various reasons, we have argued that they are procedurally barred and they are meritless and they simply do not establish grounds for federal habeas corpus review.").

Respondent's footnote contention that the Petitioner's "complaint about *modus operandi* evidence . . . 'changes the substance of the questions already presented,' " Respondent's brief at 26-27, n. 5 (citation omitted), is incorrect, and is also refuted by the Respondent's pleadings. It is the *Respondent* who has always contended that *modus operandi* was the purpose for the surprise testimony, *see* Petitioner's brief, at 11-13, Respondent continued to so contend in its Brief in Opposition at 4 (citing portion of Virginia Supreme Court opinion where the Court accepted the *modus operandi* argument from Respondent's direct appeal brief), and Respondent continues to say so now. *See* Respondent's brief at 7, 19, and 20.

[9] For example, it is not fair to say that on direct appeal "Gray never claimed that the Commonwealth had misled him about the issues to be tried in the penalty phase . . . " Respondent's brief at 6. In the direct appeal brief, counsel explained that the Slezak testimony was introduced "[o]ver defense counsel's vigorous objection," an objection that was made because

2. Petitioner does not seek a rule of discovery

Respondent attempts to deflect this Court's attention from prosecutorial misconduct by offering varying formulations of Petitioner's claim, in much the same way as it distracted the court of appeals. The rule on which Petitioner relies is not: "misleadingly incomplete" disclosure of evidence (Respondent's brief at 29); a requirement of "advanced disclosure of the evidence" the state intends to produce (Respondent's brief at 37 n. 12); a requirement that the defense receive pretrial notice of prior statements of witnesses (Respondent's brief at 33-34); a rule preventing prosecutors from changing their factual theories or adding to their evidence (Respondent's brief at 26); or the general rule forbidding prosecutorial misconduct. Respondent's brief at 38.

Respondent crafts these "paraphrases" of Petitioner's claim to bar them, in Respondent's view, by the non-retroactive principles of *Teague v. Lane*, 489 U.S. 288 (1989). However, as consistently stated in Petitioner's opening brief, Mr. Gray's submission is only that the prosecution may not employ deception to keep an opposing party from developing its case on an issue that the state has made determinative of the outcome. *See* Petitioner's Opening Brief at 37.

"Gray's defense counsel were taken by surprise by the introduction of any evidence of the Sorrell crimes other than the testimony from Tucker." Appellant's brief at xvii, 3. Of course, the reason they were "surprised" was that they had been misled "until the conclusion of the 'Guilt Trial' on December 5, 1985." Appellant's brief at 4.

In these habeas corpus proceedings, Petitioner presented his claim by following the requirement of pleading facts which, if true, would entitle him to relief, *see, e.g., Blackledge v. Allison*, 431 U.S. 63, 75 n. 7 (1977); *see also* Liebman & Hertz, *Federal Habeas Corpus Practice and Procedure* § 11.6 (2d ed. 1994), and there is no requirement that a petition contain in detail the legal theories warranting relief. Petitioner is free, indeed obligated, to refine his legal arguments, especially before this Court, so long as the substance of his claim remains intact.

3. Petitioner is protected from the prosecution's deliberate deceptions

a. Speaking falsely rather than staying silent hurts

Respondent asserts that "Gray's present theory is absurd, because Gray was certainly no *less* inclined, after the prosecutor's partial disclosure,[10] to prepare a defense concerning the Sorrell murders than if the prosecutor had told him *nothing* about his plans to link Gray to the Sorrell murders." Respondent's brief at 24. This ignores the reality of trial work. Had Gray's request that the prosecution disclose what it intended to present regarding the Sorrell murders been denied, or had the prosecutor not stated that he intended to present only jailhouse "snitch" testimony, then Gray's trial counsel would have known that essentially *anything* was fair game, and they would have adjusted investigation, preparation, and trial strategy accordingly. It cannot credibly be put by Respondent that information provided by the prosecution does not affect the defense.[11]

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[10] The disclosure was partial only in the mind of the prosecutor. His words spoke a complete disclosure.

[11] This Court recognized this basic principle, albeit in a slightly different context, in *United States v. Bagley*, 473 U.S. 667, 682-83 (1985) (emphasis added) (citation omitted):

> The Government notes that an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. *In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses or trial strategies that it otherwise would have pursued.*
>
> We agree that the prosecutor's failure to respond fully to a *Brady* request may impair the adversary process in this manner.

The prosecutor's actions here directly affected trial strategy. For the only alleged fact the prosecutor said he would introduce (jailhouse snitch statements) was so patently impeachable that forays into the far more

b. Withholding exculpatory evidence hurts

Shortly before the trial in this case, Melvin Tucker agreed to testify against Petitioner at guilt/innocence in return for a sentence less than death. *See* R. 766-67 (plea agreement). While plea negotiations were ongoing, Slezak asked Tucker's lawyer if Tucker could also testify about the Sorrell case. Tucker said yes.[12] If Petitioner could have shown that the police had evidence that another person had confessed to, and had the motive and opportunity to commit, the Sorrell murders, and yet the Commonwealth "prosecuted" Gray instead – again using Tucker – the entire evidentiary picture would have changed.[13] In Virginia, evidence that someone

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prejudicial factual terrain, i.e., the condition of the crime scene, would have been fraught with peril. *No* defense attorney would have done anything that would have carried the remotest possibility of opening the door to photographs of a dead child in the trunk of her dead mother's charred automobile. But if it was possible that the *Commonwealth* would introduce such evidence, preparation to deflect its power would have been considered.

[12] Slezak asked Tucker's defense attorney to ask Tucker what involvement Gray had in the Sorrell case. Defense counsel came back and said "there was an involvement" and that "Mr. Tucker would testify." J.A. 207. "[H]e didn't give me a description [of the involvement]. He told me that he would testify." *Id.*

[13] If evidence existed that made police believe that Timothy Sorrell had committed the crime, that evidence would "[have] 'carried within it the potential . . . for the . . . discrediting . . . of the police methods employed in assembling the case.' " *Kyles v. Whitley*, 115 S. Ct. 1555, 1572 (1995) (ellipses in original) (citations omitted). Such evidence, in light of the Commonwealth's reliance upon Tucker, would reveal the possibility of fraud, *id.* at 1572, n. 15, that the police " 'set [Petitioner] up,' " *id.* at 1573, expose "the [absence of] good faith of the investigation," *id.* at 1571, and undermine "the reliability of the investigation . . . " *id*, and "the process by which the police gathered evidence and assembled the case . . . " *Id.* at 1573, n. 19.

else committed the crime the defendant is charged with is admissible. *See Weller v. Commonwealth*, 434 S.E.2d 330, 333 (Va. App. 1993) (" 'In Virginia, evidence that a crime was actually committed by someone other than the accused is admissible for the purpose of generating a reasonable doubt of the guilt of the accused.' Charles E. Friend, *The Law of Evidence in Virginia* § 150 (3d ed. 1988)."); Charles E. Friend, *The Law of Evidence in Virginia*, § 18-12 (4th ed. 1993) (statement by other suspect that he or she committed the crime admissible); *Karnes v. Commonwealth*, 99 S.E. 562, 565 (Va. 1919) ("a trend of facts and circumstances tending clearly to point out some other person as the guilty party . . . " admissible).[14]

B. MISLEADING STATEMENTS AND SIGNIFICANT OMISSIONS REGARDING THE RELEVANT FACTS.

1. Counsel requested time to prepare

> *Counsel never asked for a recess or continuance in order to marshall additional rebuttal evidence, but asked only that the factual evidence describing the crime be excluded.*

Respondent's brief at 4 (italics in original); *see also id.*, at 12. This statement ignores the opposite fact-finding by the district court and the letter and spirit of the defense requests.[15]

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[14] In *Karnes* the evidence which the Virginia Supreme Court held should have been admitted to prove the guilt of a third party included "evidence tending to show motive on [the third party's] part . . . and its rejection was prejudicial error." *Karnes v. Commonwealth*, 99 S.E. 562, 565 (Va. 1919). Among the similarities between *Karnes* and this case is the fact that the other suspect in *Karnes* "had been suspected [by the police] of the crime (though he had, after an investigation, been released). . . . " *Id.*, 99 S.E. at 564.

[15] Respondent writes that "the prosecutor's notice was, at worst, late, and may have been remedied by a recess or continuance to allow Gray to marshall rebuttal evidence. Gray, however, did not ask for a recess or

Gray's trial counsel's complaint was that, under the unique circumstances which arose from their detrimental reliance on the Commonwealth's promise, they did not have time to prepare to *rebut* the evidence.[16]

> The district court judge found the following fact:
>
> Despite their [counsels'] plea for additional time to prepare, the circuit court permitted the Commonwealth's Attorney to introduce extensive evidence about the Sorrell murders.

J.A. 343. Respondent ignores this district court fact-finding regarding a "plea for additional time to prepare," and substitutes what is called a fact-finding from the circuit court: "As the Fourth Circuit correctly found (J.A. 365), the trial record shows that, at the start of the penalty trial, *defense counsel never asked the trial court for additional time to prepare. . . .* " Respondent's brief at 12 (emphasis in Respondent's brief). Circuit courts do not find such facts; however, there was ample evidence in the record to support the district court's finding, and Respondent has not advanced any basis for rejecting the district court's fact-finding. *Amadeo v. Zant*, 486 U.S. 214 (1988) (" [i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would

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continuance." Respondent's brief at 24. If this Court upholds the district court's fact-finding that there was a request for more time, it appears that Respondent must concede that reversal is appropriate.

[16] Counsel's entreaties were precisely phrased to allow them to marshall rebuttal evidence. *See* R. 722-23, 725 ("we are not prepared to rebut, put on any rebuttal evidence. . . . We are not prepared to try the Sorrell murder today. . . . We are not prepared for any of this, other than he may have made some incriminating statements."); J.A. 25 ("Mr. Eason and I have not had the time to prepare to defend the defendant with another murder charge."); *see also* footnote 4, *supra* (Respondent's counsel's objection to lack of "fair notice" understood as a request for time to prepare).

have weighed the evidence differently.' ") (quoting *Anderson v. City of Bessemer City*, *supra*, 470 U.S. at 573-74).[17]

2. Evidence that was suppressed

Once law enforcement officials had to respond to a subpoena, the following was learned. At the time of Petitioner's trial, the police had evidence that Timothy Sorrell was the beneficiary of a life insurance policy on Lisa. The police had evidence that the night before Lisa Sorrell's disappearance she and Timothy were at a party with several persons who were deeply involved with selling illegal drugs. According to witnesses Cole and Davis, people were taking illegal drugs at the party. Some people at the party, including Timothy Sorrell, had .32 calibre weapons. One male at the party told Timothy Sorrell that he had just had sex with Lisa Sorrell. Timothy Sorrell said that he wanted Lisa killed. There was also evidence that before Lisa Sorrell's death she and/or Timothy Sorrell were engaged in fencing property stolen from Timothy Sorrell's work place. Lisa was upset about this enterprise.

According to police, when Lisa Sorrell disappeared Timothy Sorrell started acting odd, tried to set up an alibi, and made statements and took actions that were deemed suspicious by Slezak, Lisa's mother, and other persons in and out of law enforcement. When Timothy Sorrell first arrived at Lisa's mother's house after the disappearance, his pants legs were soaking wet. Lisa was found in her car which was amidst high grass that would have been dampened from the rain falling at the time of her disappearance.

Cole and Davis told police that late on the night of Lisa's disappearance Timothy Sorrell said that she was dead, she had been shot six times in the forehead, and that their child had been placed in the trunk while the car was set on fire. Police

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[17] Furthermore, counsel was under no obligation to request a continuance. Respondent has not cited a single Virginia case indicating that counsel was obligated to do any more than was done here: timely object to the evidence thus fully preserving the issue for appeal.

could not determine where Timothy Sorrell was on that day between 4:30 and 5:30 p.m., the time Lisa and her daughter disappeared.

Timothy Sorrell became and remained the sole suspect for many months. Slezak went to the Commonwealth's Attorney to discuss indicting Timothy Sorrell. Six days before trial, Lisa Sorrell's parents filed a lawsuit to block payment of the insurance benefits to Timothy Sorrell, claiming that he was the murderer, he was still being investigated, and that he was about to be indicted. Slezak and Lisa's parents were in daily communication about the case.

Respondent cannot deny that the police had this information. Instead, Respondent seeks to discredit the information, and cast it in a non-exculpatory light. Much of Respondent's fact recitation requires correction.[18]

a. Timothy Sorrell had no alibi

According to Respondent's brief, "the police investigated Timothy Sorrell's whereabouts on December 5, and corroborated what he had told them." (Respondent's brief at 16). This ignores that Timothy Sorrell had no alibi for the time of the murders:

> Q. Do you know where Timothy Sorrell was from 4:30 to 5:29 on December 5th, 1985?
>
> A. [Slezak] No.

J.A. 334. Respondent attempts to create the impression that Timothy Sorrell was consistently forthcoming and truthful

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[18] This is not limited to the Sorrell case. Respondent's facts about McClelland begin with "[a]lthough both Gray and Tucker initially were charged with capital murder, the Commonwealth soon determined that Gray was the 'triggerman.' " Respondent's brief at 2. The Commonwealth learned no such thing, and did not learn it soon. What was learned was that Tucker would say that Gray shot McClelland. Tucker did not consummate his deal with the Commonwealth until he gave just that statement on November 20, 1985, ten days before trial. Tucker's plea agreement begins with the statement "[y]our client currently is charged with capital murder." *See* R. 766-67; J.A. 339, n. 3.

about his whereabouts at the time of the Sorrell murders and claims that the district court erred in concluding that Timothy Sorrell changed his alibi. Respondent's brief at 14, 47. The district court judge heard Slezak's testimony, and the record supports the district court's finding. J.A. 187, 344.

b. Timothy Sorrell told people he wanted his wife killed, that they were dead, and how they died

Valerie Davis and Ronald Cole told Slezak 1.) that Timothy Sorrell had said at a party on December 4, 1984, the night before her disappearance, that he wanted Lisa killed and 2.) on December 5, 1984, the night she disappeared, Timothy told how she and the baby had been killed. J.A. 236-46.[19] Respondent does not dispute this,[20] but suggests that these witnesses were motivated by a reward, that they were not reliable, and that they later recanted.

Respondent writes that "[i]n June 1985, after the reward had been advertised in the newspaper, two individuals named Michelle Davis and Ronald Cole gave the Chesapeake police a report that was superficially incriminating to Timothy Sorrell. (J.A. 214-15, 235-36). The police thoroughly investigated this report, however, and determined that it was

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[19] Davis' statement recites that Timothy Sorrell's statement about his wife's and child's death was made "late that night" on December 5, 1984. J.A. 237.

[20] Respondent does refer to Timothy's statements about Lisa being dead, before her body was discovered, as merely "an allegation in the suit papers filed by the victim's parents to prevent Timothy Sorrell from collecting the proceeds of a life insurance policy. (J.A. 195-99). Obviously, allegations made in a civil suit between two extraneous parties would not have been admissible evidence in Gray's capital murder trial." Respondent's brief at 45. These were not just pleadings – Davis told Slezak that she heard Timothy Sorrell "tell us about his wife being shot six times across the forehead, and his daughter being put in the trunk of the car as someone set the car on fire," on December 5, 1984, the day Lisa disappeared and five days before the bodies were found. J.A. 237.

transparently false." Respondent's brief at 18.[21] The implication that a reward attracted these witnesses is misleading – police heard about these witnesses and made them come to the police station.[22] Equally misleading is the statement that "[a]lthough the [party] house was in their own neighborhood and they thus should not have had any difficulty in maintaining their bearings in the vicinity, they could not correctly lead the police to Timothy Sorrell's home, selecting instead a home located in an entirely different setting in the subdivision." Respondent's brief at 18. Cole and Davis gave their statements six months after the party and the murders, and Slezak testified that the house to which they led him "looks the same." J.A. 245-46.[23] According to Slezak, Cole and

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[21] Apparently Respondent believes that so long as the police say that they knew about but did not ultimately use evidence extremely incriminating to one person, that evidence is not exculpatory of another, unrelated person. *Kyles*, *supra*, teaches otherwise. In addition, no one testified that these witness statements were "superficially incriminating" and "transparently false," Respondent's brief at 18, the police obviously did not think so little of them, and these are simply Respondent's self-serving characterizations of police evidence. *See also* Respondent's brief at 45-46 (unsupported assertion that these witnesses' statements were "false" and "admittedly false").

[22] "One of the officers who knew a relative of Michelle Davis told us about them. I asked him to bring them to headquarters. They came in, we were introduced, and we interviewed them at that time." J.A. 214-15 (Slezak's testimony). The reward was publicized one week after the murders, more than six months before Cole and Davis were brought in. J.A. 280. It is not fair to claim that these witnesses provided false information because they "hoped to collect the advertised $10,000 reward for information." Respondent's brief at 45.

[23] It looks the same. Whether the color is the same or not, I don't recall. But the floorplan and the general appearance of the outside of the house is very, very similar. *It may be exactly the same*.

J.A. 245-46 (emphasis added). The confusion about the house's location could be attributed to the fact that Cole and Davis were taking drugs the night of the party (J.A. 246) and Cole was so intoxicated that "[t]he next

Davis later came to him and Cole said in a "[v]ery, very brief" discussion, J.A. 244, that his information was not true. Davis did not specifically repudiate her statement. J.A. 245. Slezak admitted that witnesses in Tidewater often refuse to testify because of fear for their own lives, he asked Cole if he had been threatened, and Cole said no. J.A. 244.

c. Other evidence pointing away from Gray and toward Timothy Sorrell

– Timothy Sorrell was the only named suspect on lab reports.[24]

– Petitioner could not have committed the crime. Notably absent from Respondent's brief is any reference to Mr. Gray's alibi. As was set forth in more detail in Petitioner's opening brief at 25, n. 25, the district court found that it appeared that it was impossible for Mr. Gray to commit the Sorrell murders within the prosecutor's alleged time frame. J.A. 345 n. 5.

– Robbery could not have been the motive for Lisa Sorrell's murder – she was found with her gold jewelry,

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day, Ronald didn't remember what had happened that night and barely remembered what had happened that day, because he had been drinking." J.A. 237. This party was in part corroborated by a witness who Respondent says refutes it. Respondent maintains that "[a]nother individual whom Cole and Davis had identified as being present at a party where they claimed Timothy Sorrell had discussed plans to kill his wife said he was in fact present at such a party in December 1984 in that neighborhood, but that Timothy and Lisa Sorrell had not been present." Respondent's brief at 18-19. Slezak interviewed this individual, whose name he received from Cole, and the individual confirmed that he attended the party, acknowledged that a woman and child were present at the party, and said that someone at the party brandished a .357 pistol. This, in key respects, corroborated the Cole/Davis statements.

[24] The Respondent writes that Timothy Sorrell continued to be the named suspect on the Sorrell murder lab reports throughout the investigation only "as an administrative measure," Respondent's brief at 16, but nobody testified to that. J.A. 195, 263.

money, and a money order in the amount of two hundred and eighty dollars ($280.00).[25]

– In addition to the insurance motive, there was evidence that Timothy Sorrell was engaged in a theft ring with Lisa and that she had tired of it. Slezak testified that police found checks written to Lisa Sorrell from various people in the community. J.A. 262. These people told Slezak that Lisa had sold them cameras, tape-recorders, and similar items, items which could have come from Timothy Sorrell's job at the Navy Supply Center. *Id.* Slezak stated that he had investigated whether Timothy Sorrell and his wife were involved together in a theft ring or theft operation concerning the Naval Supply Center and whether this involvement had something to do with her death. J.A. 264-65. The Commonwealth writes that "[t]he police investigated whether Timothy was stealing merchandise from his employer and his wife was selling it, but the Naval authorities never could confirm that such merchandise had been stolen from the Naval Supply Center." Respondent's brief at 17. They could not confirm it because the employer's "inventory control was not accurate." J.A. 262.

– Respondent has produced no newspaper article in support of Tucker's story, as the district court found. At sentencing, Tucker testified that he and Gray were looking through a current newspaper for "some information on the Murphy Mart." J.A. 22. Tucker was then asked whether "the newspaper that he had, did it have any photograph on it?" J.A. 23. Tucker said that it had a picture of the Sorrell girl. *Id.* Judge Spencer noted below that the Commonwealth had never introduced this newspaper article and picture, and now Respondent

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[25] At the penalty phase of Petitioner's trial, Slezak never mentioned – in describing this "signature crime" – that gold jewelry, money, and a postal money order were found with Lisa. The Respondent stresses that "there was only a small amount of money in her purse. (J.A. 316-17)," and that the "police were unable to determine how much money she had had when she left the Nixon residence," Respondent's brief, p. 15, but the existence of cash, a money order, and jewelry dispels any *modus operandi* connection with McClelland.

argues that a newspaper from several months earlier may have been the one to which Tucker was referring.[26]

3. Trial counsel did not say they knew about Timothy Sorrell

According to Respondent,

> Trial counsel testified that, at the time of Gray's trial, they remembered news broadcasts saying that Timothy Sorrell had been the prime suspect in the Sorrell murders, and then that he had been eliminated as a suspect.

Respondent's brief at 12. The only fair reading of trial counsel Moore's testimony is that he does not know whether he learned about Timothy Sorrell, his suspect status, or his "exoneration" before or after the McClelland trial. J.A. 139. Moreover, co-counsel Eason testified that he did not recall knowing that Timothy Sorrell was a suspect in the crimes, and that he did not follow the case closely even though it was highly publicized. J.A. 178.[27]

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[26] Respondent speculates that Tucker's testimony is equally susceptible to an interpretation that, while searching through a collection of newspapers for the current one with news about the McClelland crime, Gray came across an old newspaper he had saved with the photograph of Lisa Sorrell in it. Respondent's brief at 47-48. While this would be an interesting story, Tucker said nothing about a collection of newspapers and his testimony is not susceptible to this interpretation. He plainly referred to a then-current paper, and it is clear that there were no articles featuring a picture of Lisa Sorrell around the time of the McClelland crime.

[27] Respondent states that "between the penalty trial on December 6, 1985 and the time when Gray's conviction became final on February 24, 1986, defense counsel did not contact Lisa Sorrell's parents, did not ask Slezak why Timothy Sorrell had been a suspect, did not demand such information from the Commonwealth's Attorney or move the trial court to order that they be furnished with such information, and did not investigate the Sorrell murders in any way. This was because defense counsel felt that Melvin Tucker's credibility, and his interest in incriminating Coleman Gray, had been fully addressed during their cross-examination of Tucker in

4. The Commonwealth's other evidence of Gray's guilt – more jailhouse snitches

a. Keith Godwin – wrong story

According to Respondent, there was more (unreliable) jailhouse snitch testimony available at trial that would have tied Gray to the Sorrell crime. An inmate named Keith Godwin is said to have given a statement to Suffolk police in which he said that Gray had confessed to both the McClelland and the Sorrell crimes. This witness did not testify at trial because, according to the Commonwealth, "he was unable to negotiate the sort of benefit that he wanted in exchange for his testimony." Respondent's brief at 20.[28]

According to police documents, Godwin's story was that Gray had said that he, his wife, and Tucker abducted McClelland, Gray carried a pistol, Tucker carried a pistol, and Gray's

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the guilt phase of trial." Respondent's brief at 13 (citations omitted). To the extent this passage suggests that defense counsel somehow withdrew their complaint about the surprise evidence, and that they did so because they were happy with their cross-examination of Tucker, it is misleading. Counsel continued to press the issue in their motion for new trial, and on appeal.

Furthermore, counsel was not *required* to investigate and was not required, as Respondent suggests, to file a motion for new trial, during this time frame. *See* Respondent's brief at 12. Respondent has cited no authority that, having raised the issue repeatedly and forcefully, and having been denied relief, counsel could, or had to, keep raising the issue. Even if there was such a requirement, counsel did not know about Timothy Sorrell, had been promised all *Brady* materials by prosecutor Ferguson, and did not have an investigator. There was no apparent reason, or practical way, for trial counsel to do what Respondent suggests.

[28] Inasmuch as Godwin was not charged, the Commonwealth could have called him as a witness. He could not have refused to testify. He was not called because his statement was inconsistent with Tucker's testimony, and he would have ruined the Commonwealth's case.

Respondent could have offered Godwin's testimony below, but did not, because Godwin was apparently still negotiating. April 21, 1994, hearing at 18-19.

wife Melinda was armed with a knife. J.A. 253. According to Tucker's testimony, Melinda was not there at all. Godwin also gave a story about Gray and his wife abducting Lisa Sorrell. According to Slezak, "[t]he vast majority of the information [in Godwin's statement about the McClelland and Sorrell murders] was available through the news media," and it would be reasonable for inmates to make up stories from press accounts. J.A. 253.[29]

b. Larabee Ferrell – the Commonwealth's impeached witness

Respondent advises us that Larabee Ferrell says he overheard Gray saying that the police had eighteen fingerprints and one matched Gray's in the Sorrell case. According to Slezak, only he and Gray knew this story. Ferrell said that Gray said he was not worried about it because it was only one print, and Ferrell quoted himself as replying, "You dumb-ass, how many do you think they need?" Ferrell said that Gray then responded, "I guess I touched the owner's manual when I went through the glove box." According to Respondent, "Slezak had not told Ferrell the fiction he had told Gray about the 18 prints with one matching, and the only other person Ferrell could have heard that from was Gray." Respondent's brief at 21-22.

What Respondent did not say was that Ferrell is the snitch whose testimony at the guilt phase that he overheard Gray confess to another inmate that he shot McClelland was refuted by the other inmate, Carl Bond, a former deputy sheriff. R. 628. Moreover, at the guilt phase, Ferrell testified that he was housed three cells away from Gray, and had never met him, which eliminates the possibility that he told Gray he was a "dumb-ass." R. 573-74. Finally, Slezak acknowledged that Ferrell could have overheard Gray talking about Slezak's fingerprint ruse, and taken his story from there. J.A. 248.

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[29] Godwin wanted to testify because he faced a long prison sentence without possibility of parole for a string of armed robberies. Slezak stated that he was concerned that Godwin had fabricated his story. J.A. 254.

CONCLUSION

For these reasons, as well as for those set forth in Petitioner's opening brief, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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